IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DENVILLE LINE PAINTING, INC., by Selective Ins., as subrogor,	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
CONTINENTAL EXPRESS, INC., IVAN WAYNE JONES & JOHN DOE,	:	NO. 02-2508
Defendants.	:	

MEMORANDUM

Baylson, J. **February 28, 2003**

Denville Line Painting, Inc., by Selective Insurance, as subrogor, ("Plaintiff") brought the instant action against Continental Express, Inc., Ivan Wayne Jones, and John Doe ("Defendants") seeking subrogation for workers' compensation benefits paid to William McMillan ("McMillan") and the Estate of Hugh McCarthy, Sr. ("McCarthy Estate"), employees of Plaintiff. Defendants have moved for judgment on the pleadings or, in the alternative, summary judgment. For the reasons set forth below, Defendants' Motion for Judgment on the Pleadings will be granted.

I. Legal Standards

A. Motion for Judgment on the Pleadings

When considering a Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c), the Court must consider as true any well-pleaded factual allegations in the pleadings, must draw any permissible inferences from those facts in the non-moving party's favor, and may grant defendant's motion for judgment on the pleadings only when the plaintiff

has alleged no set of facts that, if subsequently proved, would entitle the plaintiff to relief. DeBraun v. Meissner, 958 F. Supp. 227, 229 (E.D. Pa. 1997) (citing Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)).

B. Motion for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which

that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

II. Factual and Procedural Background

Plaintiffs allege that, on or about September 1, 1999, Defendant Ivan Wayne Jones was driving a tractor trailer owned by Defendant Continental Express, Inc. and caused the tractor trailer to collide into the rear of a vehicle owned by Plaintiff Denville and driven by McCarthy. (Compl. ¶¶ 3-4.) Plaintiff further alleges that McCarthy died as a result of the accident, which occurred in Pennsylvania. Id. ¶¶ 2, 5.

After the accident, McMillan[1] and the McCarthy Estate, residents of New Jersey, filed petitions for benefits under the New Jersey Workers' Compensation Act. Id. ¶ 7. Selective Insurance, Plaintiff Denville Line Painting, Inc.'s workers' compensation benefits carrier, paid benefits to McMillan and the McCarthy Estate. Id. ¶ 8.

On August 24, 2001, Plaintiff commenced the instant action in the Bergen County (NJ) Superior Court seeking subrogation rights and protection of its Workers Compensation Lien for paying benefits under its insurance policy. Id. ¶ 9. On January 8, 2002, the action was removed to the United States District Court for the District of New Jersey and subsequently transferred to this Court on April 23, 2002. Presently before the Court is Defendants' Motion for Judgment on the Pleadings, or, in the Alternative, Motion for Summary Judgment, which was filed on October 29, 2002. For the reasons set forth below, the Court will grant Defendants' Motion for Judgment

[1] McMillan was a co-worker of Hugh McCarthy, Sr. who was near the scene of the accident.

on the Pleadings.

III. Discussion

A. Choice of Law[2]

Defendants argue that, although the accident occurred in Pennsylvania, the Court should apply the law of the State of New Jersey because McCarthy and McMillan were both residents of New Jersey and were paid workers' compensation benefits pursuant to the New Jersey Workers' Compensation Act. (Mem. Supp. Mot. J. Pleadings at 3.)

A federal court sitting in a diversity case must apply the choice of law rules of the forum state. Klaxon Co. v. Stentor Elec. Mfg. Co., 343 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). Accordingly, Pennsylvania's choice of law rules apply. Pennsylvania follows the "significant contacts" rule and applies the law of the state with the most important contacts to the action. Michael Carbone, Inc. v. General Accident Ins. Co., 937 F. Supp. 413, 417 (E.D. Pa. 1996) (citing Nationwide Mut. Ins. Co. v. Walter, 434 A.2d 164 (Pa. Super. Ct. 1981) and Griffith v. United Airlines, 203 A.2d 796 (Pa. 1964)).

The Third Circuit has recognized that Pennsylvania courts have consistently held that the state where the worker's compensation policy is regulated is the state with the most significant contacts regarding workers' compensation subrogation. Carrick v. Zurich Am. Ins. Group, 14 F.3d 907, 910 (3d Cir. 1994) (citing Allstate Ins. Co. v. McFadden, 595 A.2d 1277, 1279 (Pa. Super. Ct. 1991) and Van Den Heuval v. Wallace, 555 A.2d 162 (Pa. Super. Ct. 1989)). The Third Circuit has also recognized that a Pennsylvania court would apply the law of the state that

[2] In their Response to Defendants' Motion for Judgment on the Pleadings, or, in the Alternative, Motion for Summary Judgment, Plaintiff does not address Defendants' choice of law argument.

governs the workers' compensation insurance carrier's subrogation claim to recoveries from claims arising from motor vehicle accidents in other states. Id.

Because New Jersey regulated the workers' compensation policies of Plaintiff Denville, which paid benefits to McCarthy and McMillan, it is the state with the most significant contacts in this workers' compensation subrogation action. The Court, therefore, will apply the law of the State of New Jersey.

B. Motion for Judgment on the Pleadings[3]

1. New Jersey Workers' Compensation Act

The New Jersey Workers' Compensation Act (the "Act"), which provides prescribed benefits to an employee for work-related injuries, reserves to an injured employee a cause of action against a liable third party and creates a right of reimbursement in the injured employee's employer or its insurance carrier, which right is commonly referred to as "statutory subrogation." Continental Ins. Co. v. McClelland, 672 A.2d 194, 196 (N.J. Super. 1996) (citations omitted). The Act provides, in pertinent part, as follows:

> (f) When an injured employee or his dependents fail within 1 year of the accident to either effect a settlement with the third person or his insurance carrier or institute proceedings for recovery of damages for his injuries and loss against the third person, the employer or his insurance carrier, 10 days after a written demand on the injured employee or his dependents, can either effect a settlement with the third person or his insurance carrier or institute proceedings against the third person for the recovery of damages for the injuries and loss sustained by such injured employee or his dependents and any settlement made with the third person or his insurance carrier or proceedings had and taken by such employer or his insurance carrier against such third person, and such right of action shall be only for such right of action that the injured employee or his dependents would have

[3] In their Response to Defendants' Motion for Judgment on the Pleadings, or, in the Alternative, Motion for Summary Judgment, Plaintiff does not address Defendants' arguments set forth in their Motion for Judgment on the Pleadings.

> had against the third person, and shall constitute a bar to any further claim or action by the injured employee or his dependents against the third person . . . . The legal action contemplated hereinabove shall be a civil action at law in the name of the injured employee or by the employer or insurance carrier in the name of the employee to the use of the employer or insurance carrier, or by the proper party for the benefit of the next of kin of the employee . . . .
>
> (g) If such employee or his dependents . . . institute proceedings against the third person prior to the . . . institution of any proceedings against the third person by the employer or his insurance carrier for the injuries and loss sustained by such employee or his dependents, such employer or his insurance carrier is barred from instituting any action or proceedings against the third person for the injuries and loss sustained by such employee or his dependents.

N.J. STAT. ANN. § 34:15-40(f) and (g) (2002).

Defendants argue that Plaintiff fails to state a cause of action because it brought this subrogation action in its own name and in its own right, and not in the name of McCarthy and McMillan and not for the rights of McCarthy and McMillan as required by the Act. (Mem. Supp. Mot. J. Pleadings at 5.) Defendants also argue that, because the McCarthy's Estate brought its own action, which is still pending, less than one year after the accident occurred, the instant action is barred by the Act. Id. at 6.

a. N.J. STAT. ANN. § 34:15-40(f)

The Supreme Court of New Jersey has held that an action for reimbursement of workers' compensation expenses can be brought only in the name of the injured employee. Eger v. E.I. DuPont de Nemours Co., 539 A.2d 1213, 1219 (N.J. 1988) (citing N.J. STAT. ANN. § 34:15-40(f)). Because Plaintiff brought the instant action in its own name and not in the name of McCarthy and McMillan, the injured employees, the Court finds that Plaintiff has failed to properly bring a cause of action for statutory subrogation and will, therefore, grant Defendants' Motion for Judgment on the Pleadings.

b. N.J. STAT. ANN. § 34:15-40(g)

Courts have recognized that N.J. STAT. ANN. § 34:15-40(g) prevents the employer from bringing a subrogation action against a third party once the employee or his dependents have instituted proceedings against the third party. Trump Taj Mahal Assoc. v. Construzioni Aeronautiche Giovanni Agusta, S.p.A., 761 F. Supp. 1143, 1155 (D.N.J. 1991) (citing Wager v. Burlington Elevators, Inc., 282 A.2d 437, 442 (N.J. Super. 1971)). Because the McCarthy Estate brought its own action less than one year after the accident occurred[4], the Court finds that Plaintiff's subrogation action seeking reimbursement for workers' compensation expenses paid to the McCarthy Estate is barred by N.J. STAT. ANN. § 34:15-40(g) and will, therefore, grant Defendants' Motion for Judgment on the Pleadings.

C. Motion for Summary Judgment

Defendants argue that McMillan's sole cause of action against Defendants would be for negligent infliction of emotional distress, and that, because the Complaint fails to set forth the requisite elements for a cause of action for negligent infliction of emotional distress under the bystander rule by McMillan, Plaintiff does not have a legally cognizable claims against Defendants as his subrogee. (Mem. Supp. Mot. J. Pleadings at 7-9.)

Although N.J. STAT. ANN. § 34:15-40 authorizes an employer to institute an action against a third-party tortfeasor if the injured employee does not do so, "the third party shall be liable only to the same extent as he would have been liable had the employee himself instituted suit within a year of the accident." McClelland, 672 A.2d at 196 (citations omitted).

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[4] McCarthy v. Continential Express, Inc., Civil Action No. 00-3367, which is currently before this Court, was instituted on July 3, 2000.

New Jersey courts recognize bystander-liability claims for negligent infliction of emotional distress, which arise when a person, not otherwise a direct object of a tortfeasor's negligence, experiences severe emotional distress when another person suffers serious or fatal injuries as a result of that negligence. Gendek v. Poblete, 654 A.2d 970, 972-73 (N.J. 1995). For a bystander-claimant to prevail, the claimant must demonstrate the following: "the death or serious physical injury of another caused by defendant's negligence; (2) a marital or intimate, familial relationship between the plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress." Dunphy v. Gregor, 642 A.2d 372, 374 (N.J. 1994) (citing Portee v. Jaffee, 417 A.2d 521, 528 (N.J. 1980)).

Defendants argue that the Complaint fails to set forth the requisite elements for a cause of action for negligent infliction of emotional distress under the bystander rule because McMillan admitted at his deposition that he did not see or hear the accident occur and because McMillan is merely a friend of McCarthy's, not a family member. (Mem. Supp. Mot. J. Pleadings at 9.)

Plaintiff argues that McMillan did observe the accident because he came upon the scene moments after it occurred and that it is entitled to complete discovery on whether any familial bond existed between McMillan and McCarthy. (Mem. Opp'n Mot. J. Pleadings at 1.)[5]

[5] In response to Plaintiff's contention that the Court should deny Defendants' Motion because discovery may develop additional relevant facts, the Court issued an Order on February 11, 2003 requiring Plaintiff to file a supplemental memorandum of law with the result of such discovery, setting forth those genuine issues of fact that Plaintiff contends warrants denial of Defendants' Motion. In response to the Court's Order, Plaintiff's counsel filed a supplemental memorandum claiming that he had been denied discovery and that this was an additional reason for denial of the Defendant's Motion. (Supp. Mem. Opp'n Mot. J. Pleadings at 1.) In a telephone conference with the Court on February 21, 2003, counsel reviewed the discovery disputes. Plaintiff's counsel disclaimed any interest in filing a Motion to Compel Discovery that would be relevant to the pending Motion, and advised the Court that he had no additional facts relevant on the issues raised by the Motion.

McMillan testified at his deposition that he did not see the accident occur. (McMillan Dep. at 38, 40, 52, 85.) Because the New Jersey Supreme Court in Portee held that "observing the death or serious injury of another while it occurs is an essential element of a cause of action for the negligent infliction of emotional distress", the Court finds that Plaintiff has failed to establish a bystander-liability claim on behalf of McMillan for negligent infliction of emotional distress. Portee, 417 A.2d at 527 (emphasis added).

McMillan also testified at his deposition that he was good friends with McCarthy, who he met through their employment. (McMillan Dep. at 86.) The Court need not determine whether Plaintiff has sufficiently established the existence of the essential element of a marital or intimate familial relationship because the Court has already found that Plaintiff has failed to establish the third element for a bystander-liability claim on behalf of McMillan for negligent infliction of emotional distress.

Because the Court will grant Defendants' Motion for Judgment on the Pleadings, it is not necessary to decide Defendants' Motion for Summary Judgment. It should be noted, however, that if the Court denied Defendants' Motion for Judgment on the Pleadings, the Court would grant Defendants' Motion for Summary Judgment.

IV. Conclusion

For the reasons set forth above, the Court will grant Defendants' Motion for Judgment on the Pleadings.

An appropriate Order follows.

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ORDER

AND NOW, this 28th day of February, 2003, upon consideration of Defendants' Motion for Judgment on the Pleadings, or, in the Alternative, Motion for Summary Judgment (Docket No. 4), Plaintiff's Response thereto (Docket No. 6), Defendants' Reply (Docket No. 7), and Plaintiff's Supplemental Memorandum (Docket No. 9), it is hereby ORDERED that Defendants' Motion for Judgment on the Pleadings is GRANTED, and judgment is hereby entered in favor of Defendants and against Plaintiff.

BY THE COURT:

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MICHAEL M. BAYLSON, U.S.D.J.

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